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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1491

GEO CONTROL, INCORPORATED and
NEW HAMPSHIRE INSURANCE COMPANY,
Petitioners,

vs.

GENEVIEVE O. RASMUSSEN and
WILLIAM C. RASMUSSEN, JR.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

ALBERT H. SENNETT,
FRANK B. HUGG,
HANNA, BROPHY, MACLEAN,
MCALEER & JENSEN,
681 Market Street, Suite 300,
San Francisco, California 94105.
Attorneys for Petitioners.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105
A BOWNE COMPANY

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Petitioners respectfully pray that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 565 F.2d 1385. The opinion is printed at Appendix A, pp. 1a-14a, of the Petition for a Writ of Cer-

tiorari (October Term, 1977, No. 77-1465, filed April 14, 1978, by the Solicitor General on behalf of the Director, Office of the Workers' Compensation Programs, Department of Labor) to review the same decision. The opinion of the Benefits Review Board, printed in the Solicitor's Appendix B, pp. 15a-25a, is reported at 1 BRBS 378. The opinion of the administrative law judge, printed in the Solicitor's Appendix C, pp. 26a-74a, is unreported. Petitioners incorporate by this reference as if set forth in full the Appendices printed in the Solicitor's Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1978. The jurisdiction of the court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether death benefits under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, are limited to the same maximums as disability benefits?

STATUTES INVOLVED

The relevant pre-1972 provisions of the Longshoremen's and Harbor Workers' Compensation Act[1] appear in the left-hand column, while the same sections

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[1]44 Stat. 1426 as amended 75 Stat. 203, 33 U.S.C. 901 (1970).

as amended and new sections appear in the right-hand column. Changes as a result of the 1972 amendments[2] are printed in italics.

PRE-1972	POST-1972
Section 9.[3] . . .	Section 9.[4] . . .
If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:	If the injury causes death, or *if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury,* the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
• • • • •	• • • • •
(b) If there be a surviving wife or dependent husband and no child of the deceased to such surviving wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 15 per centum of such wages for each child; in the case of the death or	(b) If there be a *widow or widower* and no child of the deceased to such *widow or widower 50* per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of *16⅔* per centum of such wages for each child; in the case of the death or remarriage of such *widow or widower,* if there

[2]Pub. L. 92-576, §22, 86 Stat. 1251 (effective November 26, 1972).

[3]33 U.S.C. 909 (1970).

[4]33 U.S.C. 909 (Supp. V).

PRE-1972	POST-1972
remarriage of such surviving wife or dependent husband, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 35 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 35 per centum of such wages increased by 15 per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in no case exceed 66⅔ per centum of such wages. * * *	be one surviving child of the deceased employee, such child shall have his compensation increased to *50* per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, *50* per centum of such wages increased by *16⅔* per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in no case exceed 66⅔ per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.
* * * * *	* * * * *
(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.	(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not *less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.*

PRE-1972

Section 6.[5] . . .

(b) Compensation for disability shall not exceed $70 per week and compensation for total disability shall not be less than $18 per week: Provided, however, That if the employee's average weekly wages, as computed under section 10 are less than $18 per week, he shall receive as compensation for total disability his average weekly wages.

POST-1972

Section 6.[6] . . .

(b)(1) Except as provided in subsection (c), compensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

(D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 are

[5] 33 U.S.C. 906 (1970).

[6] 33 U.S.C. 906 (Supp. V).

PRE-1972

POST-1972

less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after the enactment of this subsection.

(c) The maximum rate of compensation for a nonappriated fund instrumentality employee shall be equal to 66⅔ per centum of the maximum rate of basic pay established for a Federal employee in grade GS—12 by section 5332 of title 5, United States Code, and the minimum rate of compensation for such an employee shall be equal to 66⅔ per centum of the min-

PRE-1972	POST-1972
	imum rate of basic pay established for a Federal employee in grade GS—2 by such section.
	(d) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

STATEMENT OF THE CASE

This case arises out of a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act as extended by the Defense Base Act. 55 Stat. 622, 42 U.S.C. 1651 (1970). The facts are not in dispute and were stipulated by the parties.

William C. Rasmussen worked as a hydrologist for petitioner Geo Control, Incorporated under a public works contract between his employer and the United States. The employer was insured for workers' compensation liability by petitioner New Hampshire Insurance Company.

On May 11, 1973, while riding as a passenger in a jeep, Rasmussen was killed in South Vietnam by a landmine explosion. At the time of his death his average weekly wage was $798.00. Respondents, Gene-

vieve O. Rasmussen and William C. Rasmussen, Jr., are his surviving widow and son. The employer and insurance carrier agreed to the survivors' entitlement to weekly death benefits, but a dispute arose as to the amount of benefits.

The claim was accordingly referred to an administrative law judge for hearing. In his decision of October 24, 1974, the administrative law judge ruled that the weekly amount of death benefits was determined only under Section 9 at a percentage of the employee's average weekly wage. He awarded to the widow 50% of the decedent's average weekly wage and to the son 16⅔% of the average weekly wage for a total weekly benefit of $532.00.

In making this award against petitioners, the administrative law judge rejected the contention advanced by petitioners and the Director, Office of Workers' Compensation Programs, who joined with petitioners in urging that under proper statutory interpretation, death benefits are limited by the same maximum as inter vivos, disability benefits. The employer and insurer contended that ever since the enactment of the original legislation in 1927, disability and death benefits were subject to identical limitations. They urged that even though the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act did not include an expressly stated monetary maximum for death benefits in Section 9, when that Section is read together with Sections 6(b) and (d), it establishes an absolute maximum. Application of this maximum would have re-

sulted in an initial weekly benefit of $167.00, instead of the weekly benefit of $532.00 awarded.

Upon the employer and insurer's petition for review, the Benefits Review Board affirmed. It acknowledged that the absence of an absolute maximum for death benefits created an anomalous situation, conceding that thereby benefits to the survivors of an employee would be greater than the disability payments to the same employee if he were permanently and totally disabled. Solicitor's Petition, App. B, pp. 7a, 18. The Ninth Circuit Court of Appeals affirmed the decision of the Benefits Review Board.

REASONS FOR GRANTING THE WRIT

1. The decision below creates a conflict with the decisions of two other Circuit Courts of Appeals on the same matter of federal law, which conflict can only be reconciled by this Court. *Director, Office of Workers' Compensation Programs v. O'Keefe*, 545 F.2d 337 (3rd Cir. 1976); *Director, Office of Workers' Compensation Programs v. Boughman*, 545 F.2d 210 (D.C. Cir. 1976). This divergence of opinion raises an important question of statutory construction of the national maritime law.

Do the same maximum limits for disability benefits apply to death benefits? The Third and District of Columbia Circuit Courts of Appeals answered this question in the affirmative. The court below answers this question in the negative and specifically acknowledges the contrary view in the earlier decisions by the

Third and District of Columbia Courts of Appeals. The issue of the maximum death benefit after the 1972 amendments has not been previously presented to this honorable Court.

2. The conflict among the Courts of Appeals also involves an issue important to maritime industries and by extensions of the Longshoremen's and Harbor Workers' Compensation Act to the nation's economy. The Act is extended and incorporated in five separate systems of federal compensation. 36 D.C. Code 501 (1973) (Most non-governmental employees of the District of Columbia); Defense Base Act, 55 Stat. 622, 42 U.S.C. 1651 (1970) (Persons employed at military bases outside of the United States); War Hazards Compensation Act, 56 Stat. 1028, 42 U.S.C. 1701 (1970) (Employees of governmental contractors outside of the United States); Outer Continental Shelf Lands Act, 67 Stat. 29, 43 U.S.C. 1331 (1970) (Oil derrick workers); Nonappropriated Fund Instrumentalities Act, 80 Stat. 555, 5 U.S.C. 8171 (1976) (Civilian employees of military exchanges).

In addition the Longshoremen's and Harbor Workers' Compensation Act, having application to maritime employment, impacts 30 states. The total number of covered employees was estimated before 1972 to exceed 770,000.[7] Indeed, this estimate is con-

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[7] *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings Before the Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare on S. 2318, S. 525, and S. 1547,* 92d Cong., 2d Sess. 11,255 (Remarks by Senator Eagleton).

servative in light of the recent interpretations by this honorable Court of the shoreside extensions of the Act. See, *North East Marine Terminals Co. v. Caputo*, 432 U.S. 249 (1977). The issue of the maximum benefits applicable for the death claims of the survivors of these employees is an important national issue.

3. Because the three decisions of the Courts of Appeals are exhaustive in their analyses of the complex benefits structure, the issue will not be resolved by future decisions of other Courts of Appeals. The legislative history has also been fully examined by the Courts of Appeals, by the Benefits Review Board, and in great detail by the administrative law judge. These extensive analyses and the statutes in question will only support, with respect to death benefits, one of two conclusions, both of which are now before this honorable Court.

4. The conflict among the Courts of Appeals also underscores the need for a uniform rule in determining maximum death benefits. On the Pacific Coast of the United States, death benefits are now, by virtue of the decision below, limited only by 66⅔% of the employee's average weekly wage. In the compensation districts of three states on the Atlantic seaboard, and in the District of Columbia, death benefits may not exceed the disability maximums, now 200% of the national average weekly wage. No other Court of Appeals has considered this issue. In the remaining maritime states there is a need for guidance in

the uniform and consistent application of the Longshoremen's and Harbor Workers' Compensation Act.

The urgency of the question is further emphasized by a recent decision, issued two days before the decision of the Ninth Circuit Court of Appeals below, in which the Benefits Review Board reversed its prior decision and held that the disability maximums were applicable to death claims. *Dolan v. United Brotherhood of Carpenters & Joiners,* 7 BRBS 377 (1978). With this divergence of authority, it is anticipated that litigation and appeals will increase for death claims which would not have been contested were there a uniform rule for determining maximum death benefits. Consideration of the issue by this honorable Court will further the ends of justice in the administration of the Longshoremen's and Harbor Workers' Compensation Act.

5. It is respectfully submitted that certiorari is also necessary to restore a consistent and logical meaning to the statute. All courts which have addressed this complex statutory scheme, including the court below, concede that a different maximum for death and disability benefits is an "anomaly". An anomaly is defined as a deviation from the common rule.[8] The court below, however, concluded that it is bound to accept this anomaly or deviation because of what it interprets to be a clear and unambiguous statutory directive leaving it no alternative.

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[8]Webster's Third New International Dictionary, Unabridged (1976 ed.).

The employer and insurer agree with the Third and District of Columbia Courts of Appeals that application of the proper rules of statutory interpretation removes any compulsion from the court requiring a result which is admittedly incongruous. The Third and District of Columbia Courts of Appeals correctly conclude that proper resolution of the question requires reference to and study of all pertinent sections, rather than relying upon one section only. The Ninth Circuit Court of Appeals misapprehends the meaning of Section 6(d) in relation to disability and death benefits.

Read by itself without reference to other sections, Section 6(d) makes no linguistic or logical sense. It refers to "determinations under this subsection with respect to a period," but nowhere in Section 6(d) are the words "determinations" or "period" defined. One must look elsewhere for the definition of these words in order to give effect to "this subsection."

When one contrasts the scholarly and exhaustive analysis of this crucial language in the context of the relevant portions of the Act and legislative history, spelled out by the Third Circuit Court of Appeals in *O'Keefe*,[9] with the analysis by the Ninth Circuit Court of Appeals in a single footnote, the conclusion is inescapable that Section 6(d) imposes the limitations of 6(b)(1) on death benefit payments. The conclusion by the Ninth Circuit that Section 6(d) relates only to minimum benefits does not survive critical

[9]545 F.2d at 344-347.

scrutiny, because under that reasoning Section 6(d) becomes nothing more than an unnecessary duplication of Section 10(f). It is respectfully submitted that the conclusion that death benefits are limited in the same amounts as disability benefits is consistent with the language of the statute and all of the sources of available legislative history.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted and the judgment of the Court of Appeals reversed.

Respectfully submitted,

ALBERT H. SENNETT,
FRANK B. HUGG,
HANNA, BROPHY, MACLEAN,
MCALEER & JENSEN,
681 Market Street, Suite 300,
San Francisco, California 94105,
Attorneys for Petitioners.

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(Appendix Follows)